No. 10-275

IN THE
Supreme Court of the United States

TONIA E. FISHER,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the courts below erred in granting respondent summary judgment where petitioner failed to present any evidence that respondent's asserted reason for discharging petitioner – namely, her refusal to take a work-safety training course integral to her job responsibilities – was a pretext for gender discrimination or retaliation under Title VII.

2. Whether the courts below erred in granting respondent summary judgment on petitioner's "perceived disability" discrimination claim under the ADA where petitioner failed to present any evidence that respondent viewed her as having a mental impairment that substantially limited a major life activity.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Southwestern Bell Telephone Company states the following:

Southwestern Bell Telephone Company, a Missouri corporation, is a wholly owned subsidiary of Southwestern Bell Texas Holdings, Inc., a Delaware corporation, which in turn is a wholly owned subsidiary of AT&T Inc., a publicly held Delaware corporation. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition should be denied because it seeks review of a fact-bound sufficiency-of-the-evidence determination affirmed in an unpublished opinion, and raises no issues of broader importance justifying this Court's review. Applying this Court's tripartite burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981), the district court found, and the court of appeals affirmed, that the summary judgment record contained no evidence that Southwestern Bell Telephone Company's ("SWBT") asserted reason for terminating petitioner – her insubordinate refusal to attend a required work-safety training class – was a pretext for discrimination or retaliation. Petitioner does not even challenge the correctness of those evidentiary determinations. There is accordingly no reason for this Court to review the decision below because its conclusions are both factbound and undisputed.

Instead, petitioner seeks review of issues never properly pressed or passed on below: whether, in light of this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), a "mixed-motive" analysis should have applied to petitioner's Title VII and ADA claims. [Pet. i.] Those questions are waived. In the district court, petitioner always asserted a single-motive/pretext claim, never a mixed-motive claim, and she at all times agreed that the *McDonnell Douglas* framework applied. In a single line of her brief on appeal, petitioner asserted for the first time that her discrimination claims should be analyzed under the "mixed-motive" framework, but the court of appeals held the argument was waived and de-

clined to address it. In this Court, petitioner focuses solely on Title VII and makes no argument as to why the second question presented – the applicability of a mixed-motive analysis under the ADA – warrants this Court's review. Petitioner's questions presented thus are not properly before this Court.

Moreover, even if they had been preserved, petitioner's questions presented do not warrant this Court's review. *Desert Palace* held that direct evidence of discrimination is not required in a mixed-motive case. The Court nowhere suggested that it was altering its longstanding *McDonnell Douglas/Burdine* burden-shifting framework for single-motive/pretext cases. The cases cited by petitioner do not reflect any confusion or disagreement; they uniformly hold that the *McDonnell Douglas/Burdine* framework continues to govern traditional single-motive/pretext discrimination claims. Finally, prevailing on the questions presented would not help petitioner avoid summary judgment because there is no evidence whatsoever that discrimination and/or retaliation formed any part of the motive for her termination.

STATEMENT OF THE CASE

Factual Background[1]

Petitioner was employed by SWBT as a Customer Service Technician ("CST") in the Oklahoma Instal-

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[1] Much of the petition recites unproven allegations that have no bearing on the issues presented. This brief in opposition addresses only the facts and arguments relevant to consideration of the petition. SWBT's silence herein as to any extraneous allegations in the petition does not reflect agreement with those allegations or otherwise waive SWBT's right to contest those allegations in an appropriate forum.

lation and Repair ("I&R") Organization. In that capacity, she was responsible for repairing and installing residential and business telephone lines and equipment. According to the written job description and the testimony of SWBT officials, an essential job requirement for CSTs is the ability to climb non-step telephone poles using hooks. [Pet. App. 18a.] The CST inserts the hooks into the pole as each step is taken while ascending and descending the pole. The hooks allow the CST to access telephone wires, cables, attachments, and other equipment that may be positioned at different heights and locations on the pole. CSTs are required to pass several training courses, including a "Safe Pole Climbing" class, which trains employees how to safely to climb a non-step pole using hooks. Petitioner passed the Safe Pole Climbing class when she was first hired by SWBT.

In 2002, SWBT suspended petitioner for four months without pay because she failed to timely report that she had been charged with driving under the influence of alcohol while off the job. Petitioner was permitted to resume employment subject to random drug and alcohol testing. In the spring of 2003, Fisher filed an internal grievance alleging that her suspension was motivated by gender discrimination. She asserted that a male employee outside of the I&R organization was not disciplined in a similar fashion after he was arrested for driving under the influence. She also asserted that the drug-testing requirement was retaliation for her grievance. [Pet. App. 19a-20a.]

From August 2005 to August 2006, petitioner requested and received a non-job-related short-term disability leave. [Pet. App. 20a.] Upon her return,

she was initially assigned to light-duty work due to medical restrictions imposed by her doctor. [Pet App. 20a-21a.] Petitioner's doctor released her to return to her CST position in October 2006. [Pet. App. 21a.] Due to her extended time away from the job, and consistent with SWBT policy and practice, petitioner was advised that upon returning to her CST job duties she would be required to demonstrate that she could safely access a pole using hooks. In response, petitioner stated that she did not have any hooks and had not had hooks for several years. Based on petitioner's comments, and her lengthy absence from work, petitioner's area manager, Curtis James, told petitioner that she needed to report to a New Employee Safety Training ("NEST") class – a paid, instructor-led course that reviews how to safely climb a pole using hooks – scheduled to occur the following Monday, October 23, 2006. [Pet. App. 21a-22a.]

On Friday, October 20, 2006, the day after James told petitioner to attend the NEST class, petitioner called in sick. As a result, James called petitioner at home to inquire about her attendance at Monday's NEST safety training. During that conversation, petitioner told James she could not climb a pole using hooks. James told petitioner that if she could not attend the NEST safety training for medical reasons, she would need to provide a doctor's note. He also informed her that attendance at the NEST safety training was a condition of her continued employment with SWBT, and that her unexcused refusal to attend would be considered insubordination. [Pet. App. 23a.]

Petitioner did not report to NEST safety training. Nor did petitioner present a doctor's note or any other medical information that would have excused

her from participating in NEST safety training. Consequently, James recommended petitioner's discharge, and his supervisor, Charlie Ciskowski, authorized her termination for insubordination.

Proceedings Below

1. Petitioner filed suit in the United States District Court for the Northern District of Oklahoma on August 8, 2007, alleging that her termination by SWBT (1) was motivated by gender discrimination, as well as retaliation for her complaints of gender discrimination, in violation of Title VII; and (2) was motivated by James's and Ciskowski's mistaken belief that she suffered from a psychological impairment, in violation of the Americans with Disabilities Act ("ADA").[2]

After nearly one-and-a-half years of discovery, SWBT moved for summary judgment on February 10, 2009, on all of petitioner's claims. SWBT argued that petitioner had not made out a *prima facie* case of discrimination under the first step of the *McDonnell Douglas* burden-shifting framework. As to her ADA claim, SWBT also noted the absence of any record evidence that James or Ciskowski were aware that petitioner had any psychological impairment or other medical condition, much less a condition that impaired her ability to perform a major life activity. Indeed, petitioner had just been cleared to return to work by her physician. As to her Title VII claim, SWBT presented, among other things, unrefuted evidence that at least eight male technicians in the I&R organization also had been required to re-attend the NEST safety training class as a condition of contin-

[2] Petitioner also alleged a failure to accommodate claim under the ADA which is not at issue in this petition.

ued employment due to being away from the job for an extended period.[3]

SWBT also argued that, even if petitioner had established a *prima facie* case, she had adduced no evidence that SWBT's asserted motive for terminating her – namely, insubordination stemming from her refusal to attend the mandatory NEST safety training session – was a pretext for discrimination or retaliation under the third step of *McDonnell Douglas*. Petitioner admitted that she had been told by James that she was required to attend the NEST safety training, and it was undisputed that similarly situated male CSTs were also required to attend such training.

In response to SWBT's summary judgment motion, petitioner did not dispute that the *McDonnell Douglas* framework applied to her Title VII and ADA claims. Rather, petitioner argued that summary judgment was unwarranted because she would "show . . . that the defendant's proffered reasons for the negative employment action were pretextual; the real reasons were discrimination and retaliation." [Respondent's Appendix A-14]

2. The district court granted SWBT summary judgment on all of petitioner's claims under the *McDonnell Douglas* framework that both parties agreed applied. With respect to petitioner's gender

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[3] Additionally, when James was a first-line manager, he had directed a male CST to re-attend NEST safety training as a condition of continued employment after he was away from the job for an extended period of time due to a temporary ankle injury. James himself had been required to re-attend a pole climbing class and demonstrate his ability to climb with hooks after he had been away from his CST job for an extended period of time for a non-medical reason. [Pet. App. 22a.]

discrimination claim, the district court assumed for purposes of the motion that petitioner had established a *prima facie* case, [Pet. App. 43a], and it found that petitioner had established a *prima facie* case of retaliation, [Pet. App. 58a-62a.] but it granted summary judgment for SWBT because petitioner had "not satisfied her burden to show that SWBT's reason for terminating her employment was pretextual." [Pet. App. 46a.]

The district court also found that petitioner had not established a *prima facie* case of disability discrimination because there was no evidence that SWBT "perceived her as substantially limited from performing a major life activity." To the contrary, "the evidence show[ed] that [SWBT] believed [petitioner] *could* perform the essential duties of her job," and merely wanted her to take a refresher training class before resuming those duties. [Pet. App. 53a (emphasis added).]

The district court denied petitioner's motion for reconsideration, which again embraced the *McDonnell Douglas* framework but challenged the court's factual findings that there was no genuine issue of material fact as to pretext and as to whether SWBT perceived her as disabled. [Pet. App. 71a, 74a-77a.]

3. The Tenth Circuit affirmed in an unpublished opinion. The court affirmed the district court's grant of summary judgment on petitioner's ADA claim, concluding that the record provided "no indication that SWBT perceived [petitioner] as disabled." [Pet. App. 9a.] As to petitioner's gender-discrimination and retaliation claims under Title VII, the court stated that the "sole question on appeal is whether [petitioner] submitted sufficient evidence of pretext" under the third step of *McDonnell Douglas*. [Pet.

App. 10a.] Concluding that petitioner had presented only "[u]nsupported conclusory allegations" of discrimination and retaliation, the court found that petitioner had failed to create a genuine issue of material fact. [Pet. App. 11a ("nothing in the record suggests that Ms. Fisher can establish pretext").]

In a single sentence on the last page of her brief on appeal, petitioner suggested for the first time that the district court should have analyzed her discrimination claims not under *McDonnell Douglas* but instead under a "mixed-motive" analysis.[4] The court of appeals refused to address her "newly asserted" and "inadequate" argument on that point. [Pet. App. 8a.] The court denied panel rehearing and rehearing *en banc*. [Pet. App. 14a-15a.]

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied. The decision below is fact-bound, raises no issue of general importance worthy of this Court's consideration, and is correct. Moreover, the questions that petitioner now seeks to raise are waived, do not implicate any split among the lower courts, and would not affect the outcome of the case.

I. THE DECISION BELOW IS FACT-BOUND, CORRECT, AND RAISES NO ISSUES WARRANTING THIS COURT'S REVIEW

Under this Court's *McDonnell Douglas/Burdine* burden-shifting framework, a plaintiff alleging that she was terminated "because of" unlawful considerations such as gender or disability must show that

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[4] Petitioner's appellate brief states: "Finally, the District Court did not apply a mixed motive analysis apparently on any of Fisher's claims, see Costa v. Desert Palace, No. 02-679 U.S. Supreme Court-2003; holding that direct evidence is not necessary for mixed motives." [Respondent's Appendix B-40].

those considerations were the "but for" cause of the employment action. The plaintiff first bears the burden of establishing a *prima facie* case of discrimination. The defendant then bears the burden of producing a legitimate, non-discriminatory reason for the employment decision. The burden of proof ultimately lies with the plaintiff to show that the asserted reason was pretextual. *See McDonnell Douglas*, 411 U.S. at 802-804. Applying this well-established analytical framework, the court below reviewed the summary judgment record, and concluded that petitioner had failed to raise a genuine issue of material fact as to whether SWBT's justification for terminating her was pretextual. That conclusion raises no issues of broader importance beyond this case, and thus does not warrant this Court's review.

Moreover, the correctness of the lower courts' conclusion is beyond dispute. The summary judgment record contains unrefuted testimony that petitioner's superiors terminated her because she refused to attend a safety-training class for one of her basic job duties – climbing telephone poles. As both courts below found, petitioner adduced no evidence to cast doubt on those reasons. Indeed, the petition does not contain any argument that there was a genuine dispute as to whether SWBT's justification for termination was pretextual. Nor does it point to any record evidence demonstrating pretext. This Court's review is unwarranted because the conclusion of the court below is fact-bound, correct, and undisputed.

II. PETITIONER'S QUESTIONS PRESENTED ARE NOT PROPERLY RAISED AND DO NOT WARRANT REVIEW

A. Petitioner's Questions Presented Are Waived

Petitioner asks this Court to review whether a "mixed-motive" standard should apply to petitioner's Title VII and ADA claims. As this Court explained in *Desert Palace*, 539 U.S. at 94-95, Congress amended Title VII in the Civil Rights Act of 1991 to authorize discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision. *See* 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"). Congress did not enact a similar mixed-motive provision in the ADA. *See Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010).

Here, petitioner never asserted a mixed-motive claim in the district court and always agreed that analysis of her claims under *McDonnell Douglas* was appropriate. A plaintiff must give reasonable notice that she is pursuing a mixed-motive claim. Petitioner's failure to do so constituted a forfeiture of her right to pursue such a claim. *See Hashem-Younes v. Danou Enters. Inc.*, 311 Fed. App'x 777, 779 (6th Cir. 2009) (affirming the district court's application of the *McDonnell Douglas/Burdine* framework where the plaintiff failed to raise a mixed-motive claim in her complaint or in her response to the defendants' summary judgment motion). Petitioner also failed to raise the questions presented properly on appeal.

Petitioner's one-sentence invocation of the mixed-motive framework in her brief on appeal was rejected by the Tenth Circuit as a "newly asserted" and "inadequate" argument. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836 (10th Cir. 2005) (issues inadequately briefed are waived). Petitioner's questions presented thus are not properly raised for this Court's review. *See, e.g., Davis v. U.S.*, 495 U.S. 472, 489 (1990) (Court will not consider arguments inadequately preserved below); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (same) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

In this Court, moreover, petitioner fails to explain anywhere in the petition the reasons this Court should grant certiorari on her second question presented – namely, whether the "mixed-motive" standard applies to her ADA claims. The petition focuses solely on Title VII standards. It contains no discussion of why a "mixed-motive" analysis is appropriate under the ADA despite the absence of statutory language authorizing it. *See Gross v. FBL Financial Servs., Inc.*, 129 S.Ct. 2343, 2350 (2009) (holding that the ADEA did not authorize a "mixed-motives" discrimination claim because Congress did not amend the ADEA as it did Title VII); *Serwatka*, 591 F.3d at 962-63 (holding, based on *Gross*, that the ADA likewise does not authorize a mixed-motives discrimination claim). And it fails to show that the issue is important or a subject of conflict among the circuit courts. The second question presented thus is not properly presented to this Court for this additional reason.

B. Petitioner's Questions Presented Do Not Warrant This Court's Review

1. Even if petitioner's questions presented were properly before this Court, which they are not, they would not warrant this Court's review. Contrary to petitioner's assertion, there is no circuit split or "confusion" about whether a "mixed-motive" standard applies to single-motive/pretext Title VII claims after this Court's decision in *Desert Palace*. *Desert Palace* held that "direct evidence of discrimination is not required in mixed-motive cases." 539 U.S. at 101. The Court's decision was expressly limited to mixed-motive claims, *see id.* at 91 n.1, and it did not mention, much less purport to modify, the *McDonnell Douglas/Burdine* framework. Indeed, even after *Desert Palace*, this Court has continued to apply the *McDonnell Douglas/Burdine* analysis to summary judgment challenges in single-motive/pretext Title VII cases. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53-55 (2003); *see also Johnson v. California*, 545 U.S. 162, 171 n.7 (2005) (citing the *McDonnell Douglas* framework with approval).

In contending that *Desert Palace* caused "confusion" about whether the mixed-motive analysis should be applied at the summary judgment stage in all cases, including *single-motive/pretext* cases, petitioner simply mischaracterizes the case law. Petitioner asserts that *White v. Baxter*, 533 F.3d 381 (6th Cir. 2008), demonstrates a "raging split" in the circuits, but the quoted language describes disagreement about "how to analyze summary judgment challenges in Title VII *mixed-motives* cases." [Pet. 19 (emphasis added).] The court expressly held that "the *McDonnell Douglas/Burdine* framework continues to guide our summary judgment analysis of sin-

gle-motive discrimination claims brought pursuant only to Title VII's general anti-discrimination provision." *Id.* at 400 n.10.

Likewise, the Fifth Circuit's decision in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), was a mixed-motive case and did not address the standards applicable to single-motive/pretext cases. Indeed, the Fifth Circuit had previously recognized that "*Desert Palace* had no effect on pretext cases under *McDonnell Douglas*" and that its adoption of a "modified *McDonnell Douglas*" standard applies only to mixed-motive cases. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340-341 (5th Cir. 2005). *Smith* did not purport to abrogate that prior precedent.

None of the other cases relied on by petitioner remotely suggests that a mixed-motive standard should apply to a single-motive/pretext claim. The First Circuit's decision in *Collazo v. Bristol Meyers Squibb Mfg., Inc.*, 617 F.3d 39 (1st Cir. 2010), straightforwardly applied the *McDonnell Douglas* framework on summary judgment. The language quoted by petitioner merely recites the cardinal summary-judgment standard that the non-moving party need not prove its case, and must only raise evidence sufficient to create a genuine issue of material fact.

The Second Circuit's decision in *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116 (2d Cir. 1997), expressly reaffirmed the "distinction that underlies all Title VII cases," namely, "the distinction between single motive and dual (or multiple) motive cases." *Id.* at 119. The language quoted by petitioner merely confirms that, when a plaintiff pursues a mixed-motive case, he need not prove "*both* that the defen-

dant's proffered nondiscriminatory reason was pretextual and that a discriminatory reason motivated the employer's adverse action." *Id.* at 120.

Likewise, by petitioner's own description, the Fourth Circuit and Eighth Circuit recognize that single-motive and mixed-motive claims are "alternative" theories. [Pet. 20-22.] Indeed, the Fourth Circuit in *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310 (4th Cir. 2005), expressly rejected the plaintiff's contention that *Desert Palace* abrogated the use of the *McDonnell Douglas* framework, stating that such an argument "finds no support in the text of *Desert Palace*, which does not even mention *McDonnell Douglas*." *Id.* at 319 n.5.

Petitioner also incorrectly asserts that the Tenth Circuit has not addressed the "impact of *Desert Palace* at the summary judgment phase." [Pet. 23 (italics added).] To the contrary, in *Fye v. Oklahoma Corp. Comm.*, 516 F.3d 1217 (10th Cir. 2008), the Tenth Circuit recognized *Desert Palace*'s holding that a "plaintiff may use both direct and circumstantial evidence to establish a mixed-motive case." *Id.* at 1226 n.1. The court also reaffirmed the *McDonnell Douglas* burden-shifting framework as an alternative framework without suggesting that it was affected by *Desert Palace*'s holding. *Id.* at 1227-28.

In sum, there is no circuit split as to whether a "mixed-motive" analysis should apply on summary judgment to single-motive/pretext discrimination claims.[5] The cases relied on by petitioner confirm

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[5] *See also Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004), *overruled on other grounds* (holding *Desert Palace* had no impact on Title VII non-mixed motive cases, and the *McDonnell Douglas* framework continues to apply at summary judgment to single-motive/pretext cases); *Makky v. Certoff*, 541

that the two are alternative theories. The courts below did not apply a mixed-motive analysis for the simple reason that petitioner never claimed to be pursuing a mixed-motive case.

2. This Court's review also is unwarranted because SWBT would have been entitled to summary judgment even if petitioner had pursued a mixed-motive case. To avoid summary judgment, the record evidence would have had to allow a reasonable jury to find by a preponderance of the evidence that gender discrimination or retaliation were "motivating factors" in SWBT's termination decision. *See Desert Palace*, 539 U.S. at 101; *Fye*, 516 F.3d at 1225. Here, the district concluded that petitioner's "allegations of gender discrimination [were] not supported by any evidence, and instead, her vague allegations of gender discrimination [were] directly contradicted by the evidence in the summary judgment record." [Pet. App. 45a.] Likewise, the district court found that petitioner had failed to establish even a *prima facie* case of disability discrimination. [Pet. App. 54a.] The court of appeals affirmed the district court's conclusions regarding discrimination and retaliation, [Pet. App. 9a-11a], and the petition offers no evidence

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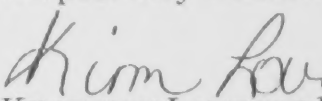
F.3d 205 (3rd Cir. 2008) (recognizing that *McDonnell Douglas* continues to apply to a single-motive/pretext case); *Pheng Vuong v. New York Life Insurance Co.*, 360 Fed.Appx. 218 (2nd Cir. 2010) (recognizing that the court applies either the *McDonnell Douglas* framework or the mixed-motive analysis to Title VII cases on summary judgment depending on the evidence presented); *Sallis v. University of Minnesota*, 408 F.3d 470, 475 and n.4 (8th Cir. 2005) (holding that Title VII cases are analyzed under *McDonnell Douglas* if the plaintiff presents a case of pretext and the *Desert Palace* mixed-motive analysis if the plaintiff presents a mixed-motive case), *Hawn v. Executive Jet Management, Inc.*, 615 F.3d 1151 (9th Cir. 2010) (applying *McDonnell Douglas* framework to Tile VII discrimination case.

to undermine them. Because the record contains no evidence that gender or disability discrimination or retaliation were even part of the reason for petitioner's termination, the decision below was correct under a "mixed-motive" framework.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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